In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1363

OAK CLIFF-GOLMAN BAKING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4) is reported at 505 F.2d 1302. The Board's decision and order (Pet. Supp. App. 6-7) are reported at 207 NLRB No. 138.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2-3) was entered on January 3, 1975, and a timely petition for rehearing was denied on February 7, 1975 (Pet. App. 5). The petition for a writ of certiorari was filed on April 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the company violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally reducing the wages of its employees during the term of its collective bargaining agreement with the union.

STATUTE INVOLVED

Section 8 of the National Labor Relations Act, 61 Stat. 140, as amended, 29 U.S.C. 158, provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
> >
> > * * * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title; * * *
> >
> > * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employement, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)—(4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

STATEMENT

A. *The Board's Findings of Fact*

The Company is engaged in the manufacture, sale, and distribution of baked goods in the Dallas, Texas, area. On September 9, 1970, the Company entered into a multi-employer collective bargaining agreement with the Union,[1] which by its terms was to remain in effect until July 22, 1972 (A. 4, S.A. 4; A. 100).[2] The agreement covered all Company employees except its Sales Department, Thrift Store, and office and clerical personnel (A. 4; 67, 84, 89).

Article IX, Section 9.4, of the contract provided for specific increases in hourly wage rates to be paid to the various classifications of employees, to become effective as of the pay period beginning nearest July 25, 1971 (A. 5; 38-39, 88-93). In most instances, wages were to be increased by 35 cents per hour (A. 5 n. 4; 88-93). Article XIV of the contract provided for a Grievance and Arbitration Procedure to resolve "disputes arising between the Employer and the Union and/or employees concerning the interpretation and application of the provisions of this Agreement" (A. 5; 96). Further, Article XVI, Section 16.1, entitled "Non-Opening," provided as follows (A. 5; 99):

> The Employer and the Union, for the life of this Agreement, each voluntarily and unqualified [*sic*] waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement, or with respect to any subject or

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[1] Bakery and Confectionary Workers, Local No. 111.

[2] "A." and "S.A." refer to the appendix and the supplemental appendix to the briefs in the court of appeals. Copies have been lodged with the Clerk of this Court.

> matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

In October 1971, the Company encountered financial difficulties and accordingly began a program of cost reduction (A. 5-6, S.A. 4; A. 69-70). On October 5, Company Executive Vice President Larry Golman met with Company department heads, explained the financial difficulties, and told them that they would have to take a 10 percent reduction in salaries (A. 6; 71). Golman also announced that he would seek Union approval of wage reductions for unit employees at a meeting with Union representatives that he had requested (*ibid.*).

Later that day, Golman held a meeting with Union Financial Secretary Henry Molloy and Assistant Business Agent Jack Kimberlin. Golman explained the Company's financial position and advised that the Company had considered closing down but had decided to attempt to stay in business by taking several drastic actions (A. 6-7; 36-37). Golman explained that managerial personnel and employees outside the bargaining unit were taking a pay cut, and he asked that the Union give its approval to a reduction of unit employees' wages to the rates in effect prior to the July 1971 increase, which had previously been instituted pursuant to the contract (A. 7; S.A. 4; A. 38-40). Molloy explained that he could not agree because the employees involved might react by filing grievances and the other employer-signatories to the contract might demand similar wage decreases (A. 7, S.A. 4; A. 39, 51). Golman replied that he understood the Union's position, but that he nevertheless had to do what was necessary (A. 7; 40, 72, 80). Molloy then suggested that

Golman discuss the matter with International Union Executive Vice President Earl Teatrick, and it was agreed that Golman and Teatrick would meet on October 8 (A. 7-8; 39-40, 73).

At the October 8 meeting, Golman told Teatrick what he had said to Molloy and Kimberlin on October 5, and he again asked for the Union's approval for the unit employees' wage reduction (A. 8-9, S.A. 4; A. 41-42, 74-75). Teatrick responded that the Union could not agree because, as Molloy had previously explained, the Union would then have to grant similar wage adjustments to the other employers who were parties to the multi-employer contract. Golman replied that he had no alternative but to decrease the rates of pay or close the plant (A. 9; 74-75).

On October 12, Golman posted a notice requesting the employees to attend a meeting on October 13. The notice stated that the meeting would concern the Company's financial situation and that management would try to explain the emergency actions that had been taken in order to "protect and insure" the employees' future. Approximately 72 of the 135 unit employees attended the meeting. Golman explained the Company's financial situation and announced that, as of October 7, the Company had reduced employees' wages to the levels effective prior to the July increase (A. 9, S.A. 4; A. 58-62, 76). Many employees indicated that they were willing to accept the decrease in order to protect their jobs (A. 9; 63).

Subsequent to the reduction in wages, and at the request and on behalf of several individual employees, the Union filed grievances against the Company, claiming that the wage reduction violated Article IX, Section 9.4, of the contract (A. 9-10, S.A. 4; A. 43-48). The Union also filed an unfair labor practice charge with the Board (A. 2).

B. *The Decisions Below*

Upon the foregoing facts, the Board concluded that the Company made unilateral changes in wages during the contract term, that its action in effect forced the Union to accept a mid-term modification of the contract contrary to Section 8(d) of the Act, and that the Company thereby violated Section 8(a)(5) and (1) of the Act (Pet. Sup. App. 6-17). The Board ordered the Company to cease and desist from the unfair labor practices found, to restore the wage rates in effect prior to the Company's unilateral action, and to make the employees whole for any loss of earnings resulting from the unilateral reduction in wage rates (A. 19).

The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. App. 2-3).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. It is uncontested that, during the term of the collective bargaining contract, petitioner, without the consent of the Union, reduced the wage rates of its employees provided for in the contract. Petitioner contends, however, that, since it consulted with the Union in advance and since many of the employees consented to the reduction, its poor economic condition justified its reduction of the contract wages (Pet. 11). But where the employees have selected a bargaining agent, only the agent has authority to determine whether a contract may be modified in mid-term, and Section 8(d) of the Act provides that the bargaining agent may refuse to agree to a modification, as the Union did here. Nor does economic hardship excuse a violation of the law. "The Act permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute * * *." *National Labor Relations Board* v. *Harris*, 200 F.2d 656, 659 (C.A. 5).

2. Petitioner claims (Pet. 12) that, since its conduct constituted a breach of contract and a breach of contract standing alone is not an unfair labor practice, the Board was powerless to grant relief here. But petitioner's action was not only a breach of the contract but also a violation of the duty to bargain imposed by Sections 8(d) and 8(a)(5) and (1) of the Act. Under Section 10(a) of the Act, 29 U.S.C. 160(a), the Board has the power to "proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts." *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 361. It is also settled that the Board has authority to make monetary awards in such cases. *Ibid.; National Labor Relations Board* v. *George E. Light Boat Storage, Inc.*, 373 F.2d 762 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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